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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~18~~ 379

STEWART M. ALEXANDER, JR.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SUBJECT INDEX

	Page
Judgment sought to be reviewed	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	3
Reasons and Argument for issuance of writ	8
1. The decision of the Court of Appeals states principles of law directly in conflict with prior decisions of this Court	8
2. The decision below states principles of law directly in conflict with decisions of other court of appeals	10
3. The court of appeals has decided important state questions in a way in conflict with applicable state law and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision	11
A. The construction of the Indiana statutes by the Circuit Court which held that a statute which was applicable to guests in motor vehicles was applicable to guests in aircraft was clearly erroneous	11
B. In holding that the rule of *Dempsey* v. *Test*, supra, was determinative of the issues in this case, the court below rendered a decision contrary to state law and departed from the accepted and usual course of judicial proceedings	13
Conclusion	15

TABLE OF AUTHORITIES CITED

Cases

Dempsey v. *Test*, 89 Ind. App. 533	8, 9, 13, 14, 23
Hansen v. *Lewis*, 11 Ops. 42, Ohio Sup. 195	13

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245958

Cases—Continued

	Page
In re Hayden's Estate, 174 Kan. 140, 245 p. 2d 813	12
Murphey v. *United States*, 179 F. 2d 743	10
Oakland City Agricultural and Industrial Society v. *Bingham*, 4 Ind. App. 545, 31 NE 393	10
Pittsburg C. and St. L. Ry. Co. v. *Kirk*, 102 Ind. 399, 1 NE 849	9, 14
Union Trust Co. v. *United States*, 221 F. 2d 62	10
United States v. *Johnson*, 81 F. 2d 577	10
United States v. *Stewart*, 201 F. 2d 135 (CCA 5-1935)	15
Williams v. *United States*, 350 US, 857	8, 9, 10, 14, 23

STATUTES

Burns Indiana Statutes 47-1021	2, 3, 11, 12, 26
Burns Indiana Statutes 14-924	3, 12, 27
Burns Indiana Statutes 14-106	3, 12, 24, 27
Burns Indiana Statutes 47-1045	3, 11, 13, 26
Federal Tort Claims Act, 28 United States Code, Sec. 1346	3, 27, 28
28 United States Code, Sec. 2671	3, 28
28 United States Code, Sec. 2674	3, 28
28 United States Code, Sec. 1254 (1)	2

TEXTS

Restatement of Agency, Sec. 229	8

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Judgment Sought to Be Reviewed

Petitioner, Stewart M. Alexander, Jr., respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on June 5, 1956.

Citations to Opinions Below

The opinion of the United States District Court for the Middle District of North Carolina is reported at 134 F. Supp. 691. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, pages 16-25 inclusive, is reported at F. 2d .

Jurisdiction

The judgment of the Court of Appeals was entered on June 5, 1956, (*infra*, Appendix A hereto, page 16). The jurisdiction of this Court is invoked under the provisions of 28 United States Code, Section 1254 (1).

Questions Presented

(1) Was a United States Air Force officer, duly assigned as liaison officer to the Civil Air Patrol, transporting the petitioner in an Air Force airplane at the request of Civil Air Patrol officials pursuant to their efforts to arrange exhibition golf matches in furtherance of the Civil Air Patrol fund-raising and public relations program, acting within "the scope of his employment" under the Federal Tort Claims Act when the flight was for the sole purpose of transporting the petitioner, one of those golfers the Civil Air Patrol wished to induce to engage in its program, and the Air Force officer was considered in a line of duty status during the flight, but the petitioner was not one of the classes of persons authorized passage in Air Force airplanes by Air Force Regulations?

(2) Does the Rule of Indiana Law denying recovery by a hitch-hiker from a truck owner when the person employed by the owner to drive the truck invites the hitch-hiker to ride with no intention or purpose to benefit the owner determine whether an Air Force officer is "acting in line of duty" within the meaning of the Federal Tort Claims Act when he is flying an Air Force airplane in a line of duty status and with the intention and purpose of carrying out his duties as liaison officer with the Civil Air Patrol?

(3) Does the Indiana Statute, (Burns Indiana Statutes 47-1021, in force at the time of the injury) which limits the liability of operators of motor vehicles on the highways of that state to gratuitous guest passengers prevent recovery

from the United States under the provisions of the Federal Tort Claims Act in the case of a passenger in an Air Force airplane flying over Indiana?

(4) In view of the finding of the District Court that the United States was negligent with respect to maintenance of the Air Force airplane while it was in South Dakota, did the provision of the Federal Tort Claims Act imposing liability upon the United States "under circumstances where the United States if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred" permit a holding that the Law of Indiana governed the question of the liability of the United States?

(5) Was the Circuit Court justified in ignoring the findings of fact by the District Court in the absence of a finding by the Circuit Court that there was no evidence upon which the District Court could make such findings?

Statutes Involved

The relevant provisions of the Federal Tort Claims Act, 28 USC, Sec. 1346, 28 USC, Sec. 2671, 28 USC, Sec. 2674, and the pertinent provisions of the Indiana statutes, Burns Indiana Statutes 14-924, 14106, 47-1021, 47-1045 are set forth in Appendix B, *infra*, pages 26-28 inclusive.

Statement of the Case

This action was brought by the petitioner in the District Court of the United States, Middle District, of the State of North Carolina, under the Federal Tort Claims Act, 28 USC, Sections 1346, 2671 and 2674. The District Court decided for the petitioner and rendered judgment for the petitioner in the sum of Seventy-five Thousand Dollars ($75,000). The respondent appealed to the Circuit Court of Appeals for the Fourth Circuit and the Circuit Court reversed the District Court.

The petitioner, Alexander, was severely and permanently injured by the crashing and burning on September 24, 1950, near Evansville, Indiana Airport of a United States Air Force aircraft in which he was a passenger. The aircraft was being piloted by an Air Force officer in the uniform of the United States Air Force. This pilot, a Lt. Singleton, assigned by the United States Air Force to the Sourt Dakota Wing of the Civil Air Patrol as a liaison officer, had traveled from South Dakota, where he was stationed, in this airplane to Oathe, Kansas, to pick up Alexander and had taken off from the Olathe Airport with Alexander and two members of the Civil Air Patrol aboard en route to Louisville, Kentucky.

As this aircraft neared the Evansville, Indiana Airport an emergency landing was necessitated because of the failure of the gas selector valve to function, creating the inability to get gas from a full tank. The pilot did not succeed in making a safe emergency landing, the airplane crashed, and all persons on board were killed except the petitioner, Alexander.

The United States Air Force had responsibility for the maintenance of this aircraft and the maintenance was carried out by the United States Air Force personnel assigned to the Air Force-Civil Air Patrol Liaison Office, South Dakota Wing, Civil Air Patrol. Lt. Singleton was an officer of the United States Air Force assigned to duty with the Air Force Liaison Office to the South Dakota Wing of the Civil Air Patrol for the purposes of accomplishing liaison between the United States Air Force and said Wing, and of assisting the Wing in the furtherance of its mission. The aircraft was assigned to him to aid and assist him in the accomplishment of these purposes. He, under his authorization from the United States Air Force, was entitled to use the aircraft in supporting the Civil Air Patrol in its

general public relations efforts. He was in general charge of the aircraft pursuant to directives and authorization of the United States Air Force. He was also, under his general authorization from the United States Air Force, entitled to use said aircraft to assist the Civil Air Patrol in its efforts to raise funds for its legitimate purposes and was entitled to fly missions in the aircraft pursuant to requests received from officers of the Civil Air Patrol to further the legitimate objectives of the Civil Air Patrol. His death as a result of this crash was considered by the Air Force to have been incurred in line of duty, that is, not due to his own misconduct and not incurred during a period of unauthorized absence.

The sole purpose of the flight of this Air Force pilot from his base in South Dakota to Olathe and from there to Louisville, Kentucky was to transport the petitioner, Alexander, at the request of officers of the Civil Air Patrol. The reason these officers of the Civil Air Patrol requested this flight and the reason Lt. Singleton made it was furtherance of the negotiations these Civil Air Patrol officers were engaged in with members of the Professional Golfers Association at Kansas City. The Civil Air Patrol officers, acting pursuant to instructions received from Major General Lucius V. Beau, United States Air Force, National Commander of the CAP and Commanding General of Hq. and Hq. Squadron, Civil Air Patrol—United States Air Force, were attempting to induce the Professional Golfers Association and members of the Association to engaged in exhibition golf matches throughout the country to promote fund-raising efforts and public relations efforts of the Civil Air Patrol. A part of this plan was the transportation of professional golfers who participated in these exhibition matches in aircraft to and from their homes or other matches they were to engage in. Alexander was at this time a member of the Professional

Golfers Association, and a nationally known golf professional, and was one of the golfers the officers of the Civil Air Patrol hoped to persuade to offer his services in carrying out their plan to publicize and raise funds for the Civil Air Patrol.

The Air Force had in many ways expressed its immediate and great interest in the Civil Air Patrol and the Civil Air Patrol as an effective public relation medium for the Air Force. This interest was expressed in instructions to liaison officers placed with the Civil Air Patrol, such as Lt. Singleton, and in Air Force Regulations, one of which (Air Force Regulations 45-13, Sec. 3, G) provided: "All Commanders of Air Force installations will cooperate with and make use of the services of local CAP units in matters involving public relation. The CAP organization is engaged in a nationwide program of public education on matters pertaining to the maintenance of air supremacy and represents an effective public relation medium for the Air Force." As the Circuit Court of Appeals points out in its opinion, liaison officers, including Lt. Singleton, were urged to use their initiative in assisting the Civil Air Patrol in many ways, including assisting in its public relations program.

Under the federal statutes and under the Air Force Regulations, Civil Air Patrol was an auxiliary of the United States Air Force and was commanded by a regular officer of the United States Air Force, Major General Lucius V. Beau, who was assigned to that duty by the Chief of Staff of the Air Force pursuant to the authority of the Secretary of the Air Force and the President of the United States. In this capacity he had command authority over both Civil Air Patrol personnel and United States Air Force officers assigned as liaison officers with the Civil Air Patrol.

This project, pursuant to which the flight in question was requested by Civil Air Patrol officials and executed by the United States Air Force officer, had the approval of Major General Beau, USAF, who had instructed the Air Force and Civil Air Patrol officers conducting the negotiation with the Professional Golfers and who arranged the flight in question to proceed with the project in any way they deemed desirable.

After the crash, Major General Beau issued written orders which purported to confirm previous oral orders authorizing the flight.

This flight was arranged by the CAP officials and the regular Air Force officers as a part of their efforts to induce the Professional Golfers Association Committee with whom they were negotiating to cooperate in carrying out the Civil Air Patrol public relations program as well as to induce Alexander himself to cooperate in the program.

The District Court held that Alexander was not a trespasser on board this Air Force airplane and that, therefore, the United States owed him a duty of due care. The Court found that the flight carrying Alexander was for the purpose of benefitting the Civil Air Patrol and the United States Air Force and was at least within the scope of the apparent authority of the Air Force officers concerned. The District Court held that the well established rules of agency and the doctrine of *respondeat superior,* prevalent in Indiana and elsewhere, would entitle Alexander to recover under the Federal Tort Claims Act against the United States if the Air Force officer operating the airplane or other personnel in connection with the airplane failed to exercise ordinary care and prudence in the maintenance and operation of the plane. The court further found that there was want of due care on the part of the United States Air

Force personnel, both in the operation and in the maintenance of the aircraft and that Alexander's injuries resulted from this want of due care.

The respondent appealed to the Fourth Circuit Court of Appeals and the Court reversed the judgment of the District Court.

Reasons and Argument for Issuance of Writ

1. *The decision of the Court of Appeals states principles of law directly in conflict with prior decisions of this court.*

While the Court of Appeals paid lip service to *Williams* v. *United States*, 350 U.S. 857, it did not follow the decision in that case. The Court of appeals in essence said that an act of an Air Force officer not strictly in accord with the letter of Air Force Regulations was not within the scope of his employment and that having thus settled that point the Court must look to the law of Indiana to determine whether a master is liable for actions of his servant which are without the scope of his employment. But the *Williams* case clearly held that even though a member of the military forces is acting in violation of Army Regulations he could still be acting within the scope of his employment as that phrase is used in the Federal Tort Claims Act.

This line of reasoning led the Court of Appeals to apply the rule of *Dempsey* v. *Test*, 89 Ind. App. 533, which is merely the almost universally accepted doctrine that employing a servant or agent solely to drive an automobile or cargo truck does not of itself render the master liable to a hitch-hiker picked up by that servant or agent under the doctrine of *respondeat superior*. Certainly the holding in that case does not depart from the rule set forth in Restatement of Agency, Sec. 229, which lists many factors that must be considered to determine whether an act is within the scope of employment.

In deciding *Dempsey* v. *Test*, supra, the Indiana Court, far from departing from well established and widely accepted rules of law, merely followed the principle that when an agent is acting in a way not contemplated in his employment and with no purpose or intention to carry out one of the ends or goals of his employment that the agent does not by his wrongful acts render his master responsible under the doctrine or *respondeat superior*. To apply the rule of that case to the case at bar is clearly in conflict with the Law of Indiana and constitutes a far departure from the accepted and usual course of judicial proceedings. This matter is further discussed later in this petition because of these important features.

To place this narrow construction upon the holding in the *Williams* case would be to return to the point of view expressed by the Ninth Circuit Court of Appeals in the *Williams* case before this Court reviewed that decision. The Court of Appeals below is saying that where a serviceman acts in violation of military regulations the United States is not liable for tortious acts under the Federal Tort Claims Act unless the law of the place where the injury occurred permits recovery against the master regardless of whether a servant is acting within the scope of his employment. The *Williams* case held that you look to the law of the place where the act or omission complained of occurred in considering all of the elements of the *Doctrine of respondeat superior*, that is to say, both what constitutes the scope of a servant's employment and the consequences flowing from his act pursuant to the scope of his employment.

This view adopted by the Court of Appeals, led it to disregard statements contained in: *Pittsburg C. and L. Ry. Co.* v. *Kirk*, 102 Ind. 399, 1 NE 849, where the Court said: "Where a servant is engaged in accomplishing an end

which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end, which result in injury to another, the master is answerable for the consequences, regardless of the motive which induced the adoption of the means, and this, too, even though the means employed were outside of his authority, and against the express orders of the master." And *Oakland City Agricultural and Industrial Society* v. *Bingham*, 4 Ind. App. 545, 31 NE 393, where the Court said: "Where a master employs one in a vocation requiring him to act under certain conditions, and commits to his discretion the duty of determining when and what action may be necessary, the employer will be responsible for the misjudgment as well as the misconduct of the servant, and if he acts when there is no occasion for it at all, although intending to accomplish that end of the employment, such responsibility will still exist."

2. *The decision below states principles of law directly in conflict with decisions of other court of appeals.*

In addition to dealing with military regulations in a manner contrary to the decisions in *Williams* v. *United States*, supra, *United States* v. *Johnson*, 81 F. 2d 577 and *Murphey* v. *United States*, 179 F. 2d 743, the Court of Appeals in purporting to apply the law of Indiana to this case was in conflict with the decision of the Court of Appeals of the District of Columbia in *Union Trust Company* v. *United States*, 221 F. 2d 62.

In *Union Trust Company* v. *United States*, supra, the Court of Appeals sustained the finding of the District Court that employees of the United States operating an air control tower at the Washington Airport were negligent in directing aircraft how to land, and that as a result of that negligence there was a collision between two aircraft causing injury to the plaintiff. The control tower was in Vir-

ginia and the collision between the two aircraft occurred in the District of Columbia. The Court held that the law of Virginia, limiting the amount of recivery for the death of an individual, applied to limit recovery in this case. The Court held that this decision was based on a construction of the Federal Tort Claims Act, and, specifically, the words "under circumstances where the United States if a private person would be liable to the claimant in accordance with *the law of the place where the act or omission occurred.*"

In the case at bar the negligent acts or omission in connection with the maintenance of this aircraft occurred in the State of South Dakota where the aircraft was stationed. In the case at bar the court says that it must follow the law of the state "where the injury occurred," Indiana, rather than the law of the state where at least one of the relevant acts or omission occurred, South Dakota.

3. *The Court of Appeals has decided important state questions in a way in conflict with applicable state law and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.*

(A) The construction of the Indiana statutes by the Circuit Court which held that a statute which was applicable to guests in motor vehicles was applicable to guests in aircraft was clearly erroneous.

Burns Indiana Statutes, 47-1021 (Appendix B, page 26), was enacted in 1929 and is codified in Burns Indiana Statutes as a part of Chapter 10, which is the Indiana Motor Vehicle Financial Responsibility Act. Burns Indiana Statutes-47-1045 (Appendix B, page 26) is a part of this Chapter 10, and defines the words and phrases used in the Act. It is to be noted that a motor vehicle is there defined as "every vehicle which is self-propelled upon a public highway in this state, excepting farm tractors." It should also

be noted that an operator is defined as "every person other than a chauffeur who is in actual physical control of a motor vehicle upon a highway of this state," and a chauffeur is defined as "every person who is employed for hire for the principal purpose of operating a motor vehicle upon the highway."

Applying these definitions to Section 47-1021, it is clear that the term "motor vehicle" used in that Section would not mean aircraft, but only vehicles self-propelled upon a public highway, and in like manner an "operator" would not be an airplane pilot who is not "in actual physical control of a motor vehicle upon a highway of this state."

When Section 6 of the Uniform Aeronautics Act of Indiana averted to by the Court of Appeals as Burns Indiana Statutes 14-106 (Appendix B, page 27) was enacted into law in 1927, Burns Indiana Statutes 47-1021 was not in existence.

Moreover, in 1951, after the airplane crash in the case at bar, Indiana adopted a statute limiting the liability of airplane owners and operators to guests. (Burns Indiana Statutes 14-924). This was codified as a part of Chapter 9 of Burns Indiana Statutes which dealt with liability of owners and operators of aircraft for damages. It was certainly never contemplated that the Motor Vehicle Financial Responsibility Act would cover aircraft and this subsequent Act, including the section exempting gratuitous guest passengers was specifically designed to deal with the matter of aircraft. If the enactment of Section 14-924 in 1951 had any significance it was that previous statutes did not include aircraft when talking about motor vehicles.

State courts dealing with statutes in almost exactly the same language, have reached this conclusion. The Supreme Court of Kansas in *In re Hayden's Estate,* 174 Kan. 140, 254 P. 2d 813, said: "We have little difficulty in concluding that our own guest statute applies only to persons

who are transported by owners or operators of motor vehicles, as their guest, on the highways of the state; that it has no application to guests while riding in airplanes. . . ." The same result was reached by the Ohio Court in *Hansen* v. *Lewis*, 11 Ohio OPS 42, 5 Ohio Sup. 195, where the language of the Ohio statute was exactly the same as that of the Indiana statute.

It is true that in 1927, two years before the enactment of the Indiana Automobile "Guest Statute," Indiana enacted a statute which provides that the liability of the owner of one aircraft to the owner of another aircraft shall be determined by the rules of law applicable to torts on land. Significantly, this did not mention the operator of aircraft and was clearly designed to refer to general principles of tort law. For example, farm tractors are specifically excluded from the automobile "guest statute" in the definition of motor vehicles contained in Burns Indiana Statutes 47-1045. The rules of law applicable to farm tractors and to motor boats might as well be applicable to airplanes. But it is clear that the court below was completely erroneous in stating that the automobile "Guest Statute" so applied to aircraft as to deny the petitioner's right to recover under the Federal Tort Claims Act.

(B) In holding that the rule of *Dempsey* v. *Test*, supra, was determinative of the issues in this case, the court below rendered a decision contrary to state law and departed from the accepted and usual course of judicial proceedings.

The Court of Appeals below was so preoccupied with its view that because the flight was not in accord with Air Force Regulations, the flight was completely unauthorized, and an act outside the "scope of employment" of the officers involved, it did not consider the law of Indana or of any other state to determine what circumstances must be considered in determining whether an agent is acting within the scope

of his employment. In its opinion the court below said: ". . . it is immaterial that, in answering the interrogatories in this case, the United States stated that Singleton's death was considered by the Air Force to have been incurred in line of duty; and that under his general authority from the United States Air Force he was entitled to use the aircraft to assist the CAP in its efforts to raise funds for its legitimate purposes."

This attitude not only does violence to the holding in *Williams* v. *United States*, supra, but results in a completely unwarranted application of the rule in *Dempsey* v. *Test*, Supra, wherein the Indiana Court was careful to explain in connection with the invitation of the truck driver to the hitch-hiker "that the giving of the invitation or permission was not within the general scope of the employment, or with a view of accomplishing some end thereof."

It *was* material that this flight was made by the Air Force officer with a view of accomplishing some legitimate end of his employment or duties. And the Indiana Court has said, on the contrary, that it is *not* material that the means used to accomplish that end were themselves unauthorized "and against the express orders of the master." (See *Pittsburg C. and St. L. Ry. Co.* v. *Kirk*, supra.)

Moreover, in view of the clear language of the Federal Tort Claims Act it *was* material that during this flight the Air Force officer flying the airplane was in a line of duty status. Admittedly, the flight was solely for the purpose of transporting Alexander pursuant to the request of Civil Air Patrol officers and pursuant to the plan to publicize and raise funds for the Civil Air Patrol with its attendant benefits to the Air Force, and was not, as far as the pilot was concerned, a frolic of his own.

The Court of Appeals completely ignored the finding of fact by the District Court that while the sole purpose of the flight in question was to transport Alexander, the sole

purpose of transporting Alexander was to benefit the Civil Air Patrol and the United States Air Force. This benefit was furthering the fund-raising and public relations project. Admittedly, one of Lt. Singleton's duties was to assist in such projects and the District Court found that it was in carrying out that duty that he made the flight. The Court of Appeals did not hold that there was insufficient evidence upon which the District Court could base such findings.

In *United States* v. *Stewart*, 201 F. 2d 135 (CCA 5-1935), the Circuit Court refused to upset the District Court's finding of fact that the government employee's "act was so closely related to and connected with the proper discharge of his duties as to render the United States liable in damages for the resulting Injury."

Conclusion

For the foregoing reasons, the petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Fourth District to review its judgment herein.

Respectively submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7162

UNITED STATES OF AMERICA, Appellant,

versus

STEWART M. ALEXANDER, JR., Appellee

Appeal from the United States District Court for the Middle District of North Carolina, at Durham

(Argued April 23, 1956 Decided June 5, 1956)

Before PARKER, Chief Judge, SOPER, Circuit Judge, and THOMSEN, District Judge.

William W. Ross, Attorney, Department of Justice, (Warren E. Burger, Assistant Attorney General; Edwin M. Stanley, United States Attorney, and Melvin Richter, Attorney, Department of Justice, on brief) for Appellant, and Daniel K. Edwards, for Appellee.

SOPER, Circuit Judge:

This suit was brought by Stewart M. Alexander, Jr. against the United States under the Federal Tort Claims Act to recover damages for injuries received while he was riding as a passenger in a United States Air Force aircraft, which crashed in attempting to land at the municipal airport at Evansville, Indiana on September 24, 1950. The Government denied liability on the grounds (1) that the flight, which was undertaken for Alexander's convenience, was unauthorized; and (2) that the evidence failed to show either that the aircraft was negligently maintained or that it was negligently operated. The district judge, however, found for the plaintiff and assessed the damages at $75,000.00. See 134 F. Supp. 691.

Alexander was a leading professional golfer. In September, 1950 he was playing in a tournament at Kansas City, Missouri and he desired upon the conclusion of the tournament on September 24 to go to his home in Lexington, North Carolina to visit his family before leaving on a golfing tour in South America. He discovered that he could not obtain the desired transportation by commercial airline at Kansas City to carry out his plan and when this became known representatives of the Civil Air Patrol procured a ride for him in an Air Force aircraft from Olathe, Kansas to Louisville, Kentucky where commercial air transportation to his home was available. The plane was furnished by the South Dakota Wing of the CAP. It had been assigned to First Lt. Oliver a Singleton, USAF, who was a Liaison Officer of the USAF attached to the South Dakota Wing. With Singleton as pilot and Alexander and two CAP officers as passengers the plane took off from Kansas City to Louisville. The two CAP officers went along apparently for pleasure. The sole purpose of the flight was to enable Alexander to reach his home. As the plane approached Evansville the fuel in one of its tanks ran low and, when the pilot attempted to switch to a full tank, a cotter pin on the handle of the switch sheared off and the change could not be made. Shortly thereafter both engines stopped for lack of fuel and a few minutes later, in attempting to land at the Evansville airport, the plane struck the ground and burst into flames. The pilot and the two CAP officers were killed and Alexander was severely burned and otherwise injured. The conclusion of the district judge that the aircraft was being operated at the time on the business of the United States in charge of an employee of the United States, acting in the line of duty, was based upon the relationship between the United States Air Force and the CAP and the liaison between them, and upon the circumstances under which the flight was undertaken.

The Civil Air Patrol was created in 1941 by Executive Order of the Director of Civilian Defense of the United States under the authority of the War Department by Presidential order of April 29, 1943; and it functioned during the war under the Commanding General of the Army Air

Force. It became a corporation by Act of Congress on July 1, 1946, whereby a number of private citizens were incorporated to encourage and aid American citizens in the contribution of their efforts and resources in the development of aviation and in the maintenance of air supremacy and to develop the voluntary contribution of private citizens to the public welfare. It was designed also to provide aviation education and training, especially to its senior and cadet members, and to encourage civilian aviation in local communities and to provide an organization of private citizens with facilities to aid in meeting local and national emergencies. The original membership consisted of more than 100,000 senior and cadet members; and eligibility for membership is determined by the constitution and by-laws of the corporation. It has no power to issue capital stock or engage in business for pecuniary profit, its object being solely of a benevolent character. It is required to make and transmit to Congress each year a record of its proceedings for the preceding year. 36 U.S.C. §§ 201-208.

By subsequent Act of Congress the Civil Air Patrol is established as a volunteer civilian auxiliary of the United States Air Force; and the Secretary of the Air Force, in order to assist the CAP in the fulfillment of the objectives set out in the earlier Act, is authorized, under regulations prescribed by him with the approval of the Secretary of Defense, to furnish the CAP from available stocks which are in excess of the Government's requirements, with aircraft, motor vehicles and related supplies. The Secretary of the Air Force is also authorized to permit the CAP to use such services and facilities of the Air Force as in his opinion are required by it to carry out its mission and to this end to furnish it with fuel; and to establish and maintain liaison offices of the Air Force at national, state and regional headquarters of the CAP; and to detail military and civilian personnel of the Air Force to such offices and to assist the CAP in its training program. 5 U.S.C. 626 (1).

Air Force Regulations promulgated under the authority of this statute provide for the administration and organization of the CAP, auxiliary of the Air Force. See Air Force Regulations 45-11 to 45-14. National headquarters

are provided, which are directed to supervise all CAP activities under the jurisdiction of the Air Force. It is provided that the National Commander of CAP shall be a regular United States Air Force General officer who serves in the dual capacity as its head and also as commanding general of the Headquarters Squadron, CAP, USAF. At the time of the accident in this case the National Commander was Major General Lucius B. Beau, USAF, and Lt. Singleton, USAF had been assigned as liaison officer to the South Dakota Wing of the organization, which is one of the fifty-one wings set up in the continental United States and the Territories under the Regulations. As a liaison officer he was part of the headquarters squadron and was not subject to the orders of the CAP Wing Commander or his staff. His duties as liaison officer were to advise and assist the CAP Wing Commander and staff on military matters in the administration of CAP units in the state to which he was assigned. He was furnished with an Air Force plane which he was to utilize as much as possible on trips of not more than one day to visit CAP units. He was permitted to absent himself from his station for periods of twenty-four hours in the performance of his instructional duties. He was to devote full time to the execution of his duties, as above set out, but was cautioned that this should not be construed as limiting by any means his duties as liaison officer. The importance of "selling" the CAP to the public was emphasized.

While the golf tournament at Kansas City in which Alexander was engaged was going on in September 1950, officers of the CAP were negotiating with a committee of the Professional Golfers Association (P.G.S.) in regard to a plan to raise money for the official purposes of the CAP, which included the recruiting of new members and the training of CAP cadets. This plan had received the approval of General Beau. It was contemplated that members of the P.G.S. would participate from time to time in golf tournaments in various parts of the country under the auspices of CAP; and that the golfers would donate their services and the funds derived from the tournaments would go to CAP. This organization on its part would undertake to transport the

tournament players to and from the golf courses in suitable aircraft. The negotiations had not been completed and the project had not been formally approved by headquarters of CAP but the golfers who were expected to participate had indicated their willingness to do so. Alexander was one of the golfers whom the officers of the CAP hoped to induce to co-operate in carrying out the plan. It was under these circumstances that Alexander's difficulty in securing air transportation to his home came to the knowledge of Col. Myhra, a CAP officer, and Capt. McCoy, an Air Force Liaison Officer, who were conducting the negotiations with the golfers. Through their efforts transportation was arranged for the flight which turned out disastrously. The South Dakota Wing agreed to furnish an Air Force plane, which had been assigned to Singleton, and upon the request of the CAP officials he agreed to fly the plane to Olathe, Kansas airport to pick up Alexander and transport him to Louisville. The purpose of the CAP officers in making the arrangements was to promote the project for raising money as above described.

The district judge was of the opinion that Alexander could not recover unless Singleton had authority to take him on the plane; but the judge thought that this authority was contained in the regulations which covered the use of United States aircraft. In his opinion he did not specify the particular regulations that he had in mind. We think that this conclusion was an error because it overlooks the express provisions of regulations which govern the carriage of passengers in military aircraft other than aircraft operated by Military Air Transport Service. See Air Force Regulations 76-6 and 76-7 which relates to Departments of the Army, the Navy and the Air Force and establishes the authorization for personnel who may ride in military aircraft. 15 F.R. 484.

The permissible provisions most nearly applicable to the present controversy are the following:

(1) Military personnel of the Air Force Reserve may ride as passengers in military aircraft upon presentation of orders by competent authority, which is defined as an official

bearing the title of Commanding Officer or higher authority in the chain of command of various branches of the Government service.

(2) CAP senior members may be carried as passengers in military aircraft when engaged in the performance of official CAP duties upon presentation of orders.

(3) Any person in case of an emergency involving catastrophe or possible loss of life, or in an emergency when other means of transportation are not available, feasible or adequate.

(4) Any individual when the travel is primarily of official concern to the national military establishment, when authorized by the Chief of Staff of the United States Army, Chief of Naval Operations or Chief of Staff of the United States Air Force.

These Regulations are made applicable to CAP passengers by Air Force Regulation 60-1, under the caption CAP PASSENGERS IN AIR FORCE AIRCRAFT, which specificially provides that all flights of CAP passengers will be accomplished in compilance with Air Force Regulations 76-6 and 76-7 and that CAP senior members are authorized to be carried in Air Force aircraft when engaged in the performance of official CAP duties and accompanied by written orders authorized by the National Commander, CAP.

It is obvious that none of these provisions cover the case of Alexander. He was not a CAP member engaged in the performance of CAP duties; nor was he a person in an emergency where other means of adequate transportation were not available, nor an individual whose travel was primarily of official concern to the national military establishment. It is true that he was an inactive Air Force Reserve officer but he was not under orders and his travel had not been authorized by competent Reserve authority. Regulation 76-6 contains the express provision that the transportation of National Guard and Reserve personnel in military aircraft other than as set out in the Regulation is not authorized.

These Regulations have been worked out with great care and precision by the highest governmental authority under the terms of the statute and it goes without saying that

neither the CAP officers who made arrangements for the flight nor the Air Force Lieutenant who undertook it had authority to disregard them. It is also true that even the Commanding General in charge of the headquarters of the CAP had no such power. On November 15, 1950, after the fatal accident, General Beau issued an order indicating that Singleton was placed on duty for one day as of September 24, 1950, to travel from Sioux Falls, South Dakota to Olathe, Kansas and thence to Louisville, Kentucky for the purpose of coordinating Air Force-CAP activities. What effect this may have had upon the military record of the deceased airman we are not prepared to determine; it is sufficient to say that it did not repeal the Regulation *pro hac vice* any more effectively than if it had been issued in advance of the flight. For like reasons it is immaterial that, in answering interrogatories in this case, the United States stated that Singleton's death was considered by the Air Force to have been incurred in line of duty; and that under his general authority from the United States Air Force he was entitled to use the aircraft to assist the CAP in its efforts to raise funds for its legitimate purposes. See *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380; *Utah Power and Light Co.* v. *United States*, 243 U.S. 389; *Parrish* v. *United States, M.D.* Ga. 95 F. Supp. 80.

These considerations warrant the conclusions that the CAP is not a Federal agency within the meaning of the Federal Tort Claims Act and that Singleton, who was a commissioned officer in the Air Force, acted contrary to the governing regulations and beyond the scope of his authority in using the Air Force plane entrusted to him to enable Alexander to reach his home. The first of these conclusions is in accord with the decision in *Pearl* v. *United States*, 10 Cir., 230 F.2d 243, where the court held that the United States had no liability for the death of a passenger on an official indoctrinating flight of the CAP in a CAP aircraft which was on loan from the Air Force and was piloted by a member of the CAP. It remains to determine whether the United States is liable for the injuries incurred in the course of the unauthorized flight undertaken by a commis-

sioned officer in its service. This depends upon the terms of the Federal Tort Claims Act which restricts the jurisdiction of the court to civil actions on claims against the United States for injury to person or property caused by the act or omission of an employee of the Government while acting within the scope of his office or employment under circumstances where the United States would be liable to the claimant in accordance with the law of the state where the act or omission occurred. 28 U.S.C. 1346 (b).

It was held in *Williams* v. *United States*, 350 U.S. 857, that even if it is shown in a suit under the statute that the injury complained of was caused by the act of a Government employee beyond the scope of his employment, the decision must be made in accordance with the doctrine of *respondeat superior* which is entertained in the law of the state where the injury occurred. Hence we turn for guidance to the law of Indiana, where the accident occurred; and we find the appropriate rule laid down by the courts of that state in the analogous situation of a person who is injured when riding in an automobile with the consent of an employee of the owner. In *Dempsey* v. *Test*, 98 Ind. App. 533, it was held that a complaint did not state a cause of action which alleged that the plaintiff was injured when riding in an automobile-truck upon the invitation of the driver, when it did not appear that the owner was present when the plaintiff was injured or knew of his presence on the truck or had authorized the driver to carry passengers thereon, but, on the contrary, stated that the truck was used by the owner for the sole purpose of hauling products to and from a farm. In sustaining a demurrer to the complaint, the court said: "While it is true that the facts pleaded show that the driver of the truck was discharging a duty of his employment when the injury to appellant occurred, it is also true that the invitation or permission given appellant to ride on the truck was that of the servant and not of the master, and that the giving of the invitation or permission was not within the general scope of the employment, or with a view of accomplishing some end thereof. In determining as to appellee's responsibility, under the facts averred, we must consider the question as to whether that which his

servant did, when he invited or permitted appellant to ride on appellee's truck, was something which his employment contemplated, and something which he might do in his employer's name.

"It has been frequently held in this state that where a person is invited to ride upon a train of cars, by an employee who had no authority to give such an invitation, the carrier is under no duty to the party accepting any such invitation to exercise care to avoid injury to such person." See also *Pittsburgh etc. R.R. Co.* v. *Hall*, 46 Ind. App. 219; *Indianapolis Motor Speedway Co.* v. *Sharp*, 88 Ind. App. 572; for the genral rule see *Liggett & Myers Tobacco Co.* v. *DeParcq*, 8 Cir., 66 F. 2d 678, 685. It seems clear that this rule should be applied to the facts of the case at bar, which show not only that the presence of Alexander in the plane as a passenger was unauthorized but, also, that the flight itself, undertaken solely to serve Alexander's convenience, was unauthorized. It follows that the United States had no liability under the Indiana law for lack of care on the part of the pilot.

If it should be thought, however, that Alexander was rightfully invited as a guest of the Government in his flight to Louisville, the case would seem to be governed by the Indiana statute applicable to guests in motor vehicles, Burns Ind. Stat. 47-1021, which provides as follows:

"The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest while being transported without payment therefor, in and upon such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or willful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle."

This statute was made applicable to aircraft accidents by § 6 of the Uniform Aeronautics Act of Indiana, Burns Ind. Statute 14-106, which provides as follows:

"The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the

air, shall be determined by the rules of law applicable to torts on land." *

There would seem to be no doubt that Alexander was a guest at the time of his accident within the meaning of this statute as it has been interpreted by the courts of the state. It has been suggested that he was not being transported without payment because of the possibility that the courtesy extended to him would contribute to the formation of a beneficial arrangement which would increase the financial resources of the CAP. It has been held in Indiana, however, that the mere possibility of benefit to the owner of the vehicle is insufficient to exclude the guest relationship. *Albert McGann Securities Co.* v. *Coen*, 114 Ind. App. 60; *Liberty Mut. Ins. Co.* v. *Stitzle*, 220 Ind. 180; *Ott* vs. *Perrin*, 116 Ind. App. 315. The mere possibility that the flight would result in material gain to the CAP in connection with an enterprise which was still in the tentative stage was too insubstantial to alter the status of Alexander as a non-paying guest.

There is no suggestion in this case that the injury to Alexander was caused by the wanton or wilful misconduct of the pilot who lost his own life when the equipment of the plane failed to operate. The maintenance and the operation of the plane were in the hands of the United States and the district judge found negligence on the part of the Government, in that the crash was caused by the failure of the gas selector pin to function and that the pilot knew that it had been stiff and hard to operate and there was no showing that the defect had been remedied by repair or replacement. The judge also found that the pilot was negligent in the manner in which he attempted to make the emergency landing. We need not examine the evidence on these points in detail, for even if it shows a breach of duty no one contends that it warrants a finding of wanton or wilful misconduct.

Reversed.

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* In 1951, after the accident to Alexander, Indiana passed an aircraft financial responsibility act, Burns Ind. Stat. 14-901 *et seq.* which incorporated in § 14-924, the motor vehicle guest statute quoted above, so modified as to make the statute expressly applicable to a non-paying passenger in an aircraft.

APPENDIX B

Statutes Involved

Indiana Statutes

Burns Indiana Statutes 47-1021:

"The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest while being transported without payment therefor, in and upon such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or willful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle."

Section 47-1021 was Acts 1929, Chapter 201, Section 1 at page 679, and was codified as a part of Chapter 10, Burns Indiana Statutes.

Burns Indiana Statutes 47-1045: "Definitions. The following words and phrases when used in this Act, shall for the purpose of this act, unless a different meaning appears from the context, have the following meanings:

* * *

(e) Operator. Every person other than a chauffeur who is in actual physical control of a motor vehicle upon the public highways of this state.

(f) Chauffeur. Every person who is employed for hire for the principal purpose of operating a motor vehicle upon the public highways. . . .

(g) Owner. A person who holds the legal title of a motor vehicle. . . .

* * *

(j) Motor Vehicle. Every vehicle which is self-propelled upon a public highway in this state, excepting farm tractors.

(k) Public Highways. Any street, alley, road, highway or thoroughfare in this state, or any of them, which is used by the public or open to use by the public."

Burns Indiana Statute 14-106: "The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land."

Section 14-106 was Acts 1927, Ch. 43, Sec. 6, page 119.

Burns Indiana Statute 14-924: "The liability of owner or operator to guest.—The owner, operator or person responsible for the operation of an aircraft shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in such aircraft, resulting from the operation thereof, unless such injuries or death are caused by the wanton or willful misconduct of such operator, owner, or person responsible for the operation of such aircraft." The title of Acts 1951, Ch. 192 reads: "An act concerning the liability of aircraft owners or operators to guest passengers while being transported without payment to such aircraft owners or operators and declaring an emergency." In force March 5, 1951.

Section of Acts 1951, Ch. 192, declared an emergency. Approved March 5, 1951.

Codified as a part of Chapter 9—Liability of Owners and Operators for Damages.

FEDERAL TORT CLAIMS ACT

28 USC Sec. 1346, 62 Stat. 933, Amended 63 Stat. 62, 63 Stat. 101:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, he United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office

or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 USC, Sec. 2671, 62 Stat. 982, amended 63 Stat. 106:

" 'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

28 USC, Sec. 2674, 62 Stat. 983:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	7
Conclusion	12

CITATIONS

Cases:

Albert McGann Securities Co. v. *Coen*, 114 Ind. App. 60	11
Alexander v. *United States*, 98 F. Supp. 453	10
Antonen v. *Swanson*, 74 S.D. 1, 48 N.W. 2d 161	10
Dempsey v. *Test*, 98 Ind. App. 533	8, 10
King v. *United States*, 178 F. 2d 320, certiorari denied, 339 U.S. 964	10
Parrish v. *United States*, 95 F. Supp. 80	10
Union Trust Co. v. *United States*, 221 F. 2d 62, certiorari denied, 350 U.S. 911	8, 9
United States v. *Eleazer*, 177 F. 2d 914, certiorari denied, 339 U.S. 903	11
Williams v. *United States*, 350 U.S. 857	7, 8, 11

Statutes:

Federal Tort Claims Act:	
28 U.S.C. 1346	2, 7, 9
28 U.S.C. 2671	2, 7
28 U.S.C. 2674	2, 7, 8
Uniform Aeronautics Act, Section 6	11
5 U.S.C. 78	7
5 U.S.C. 626l	2
Burns Indiana Statutes, 14-106, 47-1021	2

Miscellaneous:

15 Fed. Reg. 484	7
Rules of the Supreme Court of the United States, Rule 21(4)	2